What Chapter 101 aims at doing is to prevent the creation of real rights in movable property when there is no delivery of possession, except by a writing and registration.

The appeal is dismissed with costs.

WINDHAM J.—I agree.

Appeal dismissed.

1949 *Present :* **Wijeyewardene C.J. and Canekeratne J.**

ASSOCIATED CEMENT COMPANIES, LTD., BOMBAY, Appellant, *and* COMMISSIONER OF INCOME TAX, Respondent

S. C. 300—D. C. Colombo 16,757

Income tax—Claim for refund of tax paid in excess—Relief in respect of Empire tax—Prescription—Income Tax Ordinance (Cap. 188), Sections 46 and 84.

Section 84 (1) of the Income Tax Ordinance is applicable to a claim for relief arising under section 46 (1) of the same Ordinance.

APPEAL from a judgment of the District Court, Colombo.

In this action the plaintiff company sued the Commissioner of Income Tax for a refund of Rs. 13,175·91 under section 46 (1) of the Income Tax Ordinance. The question for consideration was whether the claim was prescribed under section 84 (1) of the Income Tax Ordinance.

H. V. Perera, K.C., with *S. J. Kadirgamer*, for the plaintiff appellant.

M. F. S. Pulle, K.C., Acting Attorney-General, with *H. W. R. Weerasuriya, Crown Counsel*, for the Crown.

Cur. adv. vult.

September 13, 1949. WIJEYEWARDENE C.J.—

The plaintiff company was registered in Bombay under the Indian Companies Act on August 1, 1936, as the result of the amalgamation of several cement companies which were previously operating separately. The company, which owns factories in different parts of India, opened a Branch in Colombo on May 1, 1940. The Company's accounting year ends on July 31, and thus the company's accounts are made up from August 1 to July 31 of the following year. The Income Tax Assessment Year in British India covers the same period as the assessment year in Ceylon.

The plaintiff company filed this action stating

(i) that it has paid Income Tax in Ceylon amounting to Rs. 12,457·08 for the year of assessment 1940/41 on an income of Rs. 69,206 derived from Ceylon and that it has also paid Rs. 22,514 and 8 annas as Income Tax and Super Tax in India in respect of that income, and

(ii) that it has paid Income Tax in Ceylon amounting to Rs. 13,894·74 for the year of assessment 1941/42 on an income of Rs. 77,193 derived from Ceylon and that it has also paid Rs. 25,135 and 4 annas as Income Tax and Super Tax in India in respect of that income.

The plaintiff company claimed in this action under section 46 of the Income Tax Ordinance (Chapter 188) a sum of Rs. 13,175.91 being the aggregate of half of Rs. 12,457·08 and half of Rs. 13,894·74 paid as income tax in Ceylon.

The defendant filed answer stating

(*a*) that the plaintiff's claim was barred by section 84 (1) of the Income Tax Ordinance ;

(*b*) that the plaintiff company has not proved to the satisfaction of the Commissioner of Income Tax, as required by section 46 of the Ordinance, that it paid or was liable to pay income tax and super tax in India on the income derived from Ceylon for the years of assessment ending March 31, 1941, and March 31, 1942, on income derived from Ceylon ;

(*c*) that the relevant Ceylon tax for the two years of assessment were only Rs. 10,380·90 and Rs. 11,570·96 in view of section 45 (4) (*b*) of the Ordinance and that, therefore, the plaintiff could not claim, in any event, more than Rs. 10,979·93.

The plaintiff company made its first claim for relief in respect of the year 1940/41 by P27 of May 30, 1945, and for the year 1941/42 by P29 of June 18, 1945.

In the course of the proceedings in the District Court the plaintiff company read in evidence an affidavit of the Chief Accountant of the company marked P38 and the annexures A to H referred to in the affidavit.

Following the decision of Keuneman, J. in *Nadar v. The Attorney-General*[1] the District Judge held that the plaintiff company's case was barred by section 84 (1) of the Ordinance. Further, he held against the plaintiff company on the ground (*b*) above and on ground (*c*) he held that, in any event, the plaintiff could not claim more than Rs. 10,979·93.

In appeal, the Counsel for the plaintiff company questioned the correctness of the decision in *Nadar v. The Attorney-General* (*supra*) and attacked the other findings of the District Judge. Briefly, his argument on the question of prescription was that section 84 (1) did not apply to a claim for relief arising under section 46 (1).

It is desirable at this stage to set out at length the relevant parts of section 84 (1) which enacts as follows :—

"If it is proved to the satisfaction of the Commissioner by claim duly made in writing within three years of the end of a year of assessment that any person has paid tax, by deduction or otherwise, in excess of the amount with which he was properly chargeable for that year, such person shall be entitled to have refunded the amount so paid in excess :

[1] *(1940) 41 N. L. R. 379.*

Provided that—

(i) . . . .

(ii) where any person has paid tax by deduction in respect of a dividend in accordance with section 43 or in respect of interest, rent, ground rent, royalty, or other annual payment in accordance with section 44, he shall not be entitled by virtue of this section to any relief greater than that provided by section 43 (3), (4) and (5) and section 44 (3) ".

It was argued that the plaintiff company which paid Rs. 12,457·08 and Rs. 13,894·74 for the two years of assessment, which were the amounts charged under section 20 (1) of the Ordinance, without making any deduction on account of the relief provided for under section 46 (1) could not be said to have " paid tax, by deduction or otherwise, in excess of the amount with which he was properly chargeable " for those years and that therefore section 84 (1) would not apply to the present action. It was admitted—and it had to be admitted in view of proviso (ii) to section 84 (1)—that section 84 (1) applied to the case of a person who had paid tax ascertained under section 20 (1) without deducting the amount he was entitled to set off against such tax under section 43 (3). In fact, the appellant's Counsel relied strongly on this admission to support his argument that section 84 (1) did not apply to the present case. The argument he put forward could be understood clearly by considering a concrete case. Suppose (*a*) that the tax charged upon the income of an individual A under section 20 (1) is Rs. 1,000, and (*b*) that his assessable income included a sum from which tax had been deducted under section 43 (1) and the statement issued under section 43 (2) shows the amount of the tax so deducted to be Rs. 100. There is no doubt that, if A has paid Rs. 1,000 directly to the Commissioner of Income Tax, he will be entitled to a refund of Rs. 100. In such a case A " has paid tax, by deduction or otherwise ", amounting to Rs. 1,100. Now, if the amount with which A was " properly chargeable " is not taken as Rs. 1,000 (the tax ascertained under section 20) but as Rs. 900 (the tax ascertained under section 20 less the amount claimed as set off) then section 84 (1) would enable A to claim a refund of Rs. 200 (the excess of Rs. 1,100 over Rs. 900) and not merely Rs. 100. This shows, therefore, that the amount with which A is " properly chargeable " within the meaning of section 84 (1) is the entire tax assessed under section 20. Once that construction is accepted, the position is clear that a claim made by a person in respect of the relief under section 46 (1) is not governed by section 84 (1) as may be seen from the consideration of the following example. Suppose (*a*) that the tax charged upon the taxable income of A under section 20 (1) is Rs. 1,000 ; (*b*) that A paid that amount to the Commissioner of Income Tax in Ceylon, and (*c*) that in view of a payment made by him to the Commissioner of Income Tax in India he is entitled to relief from Ceylon tax of a sum of Rs. 100 under section 46 (1). In that case, A has paid only Rs. 1,000 and not Rs. 1,100, as " tax " in section 84 (1) is the tax imposed by our Ordinance (see section 2), and, therefore, any sum paid to the Commissioner of Income Tax in

India cannot be regarded as forming part of the tax referred to in section 84 (1) as the tax " paid by deduction or otherwise ". As the amount " properly chargeable " has already been shown to be the amount charged under section 20 (1), the amount properly chargeable in the case under consideration is Rs. 1,000. It cannot, therefore, be said that A who has paid Rs. 1,000 only " has paid tax by deduction or otherwise in excess of the amount with which he was properly chargeable ". This shows that section 84 (1) cannot possibly apply to the case of a person who is claiming to be entitled to relief under section 46 (1).

The fallacy in this argument lies in ignoring proviso (ii) of section 84 (1). It is true that in the first example referred to earlier A would have been entitled to claim Rs. 200 if the amount with which he was " properly chargeable " is regarded as Rs. 900 but the proviso (ii) proceeds to say that A cannot claim anything more than Rs. 100 when it enacts that " he shall not be entitled by virtue of this section to any relief greater than that provided by . . . . section 43 (3).

The fact, therefore, that a person entitled to claim a sum by way of set off under section 43 (3) would be governed by section 84 (1) does not—to say the least—enable the plaintiff company to construe the word " properly chargeable " in a manner helpful to the plaintiff company.

After we reserved judgment, the appellant's Counsel submitted an argument that the Attorney-General would not be able to invoke the aid of proviso (ii) to avoid the effect of his interpretation of the words " properly chargeable " in a case that would arise where a taxpayer is entitled to claim a set off under section 23 (2) in respect of a tax paid by a Trustee of property of which the taxpayer is the beneficiary. The appellant's Counsel supports this argument on the ground that the proviso applies only to a tax payer who " has paid tax by deduction in respect of a dividend in accordance with section 43 ". I think, however, that the effect of section 23 (2) is to enlarge the meaning of the phrase " dividend in accordance with section 43 " so as to include the tax paid by the Trustee under section 23.

I am not prepared to assent to the argument before us in appeal that the words " the amount with which he was properly chargeable " referred to the tax as ascertained under section 20 (1) without taking into account the amount, for example, that may be claimed as set off under section 43 (3) or the amount that could be claimed by way of relief under section 46 (1). Section 5 (1) of the Ordinance enacts that "income tax shall, subject to the provisions of this Ordinance, ... be charged " at certain specified rates " in respect of the profits and income of every person for the year preceding the year of assessment (*a*) wherever arising, in the case of a person resident in Ceylon, and (*b*) arising in or derived from Ceylon in the case of every other person ". The words " subject to the provisions of this Ordinance " make it clear to my mind that in ascertaining the amount with which a taxpayer is " properly chargeable " within the meaning of section 84 (1) we should not confine our attention only to section 20 (1) but should also consider the provisions of such sections as sections 43 and 46 (1) in an appropriate case.

It was also argued that, if section 84 (1) governed the present case, there would be many instances in which the taxpayer would not be able to make his claim " within three years of the end of the year of assessment " owing to the failure of the income tax authorities assessing the Empire Tax failing to make the assessment within that period. I find it difficult to see how a taxpayer could be placed in such a situation in view of the following passage in the Ceylon Income Tax Manual referred to in the judgment of the District Judge.—

" A claim for repayment must be made in writing within three years of the end of the year of assessment to which the claim relates. It is not essential to furnish within the time limit the full details which are necessary for calculating the exact amount of repayment. If notice of intention to make a claim is made within time, the claim will be treated as valid provided that :

(1) at the time the notice is given it is proved to the satisfaction of the Commissioner that a definite title to repayment exists, and

(2) full proof of the claim is received within a reasonable time after the notice of claim has been delivered ".

Moreover, section 13 (1) (*a*) (v) introduced by Ordinance 25 of 1939 shows that the Legislature did not hesitate to give relief against any hardship created by section 84 (1) where the Legislature thought it desirable that such relief should be granted. The Legislature has not provided for any relief with regard to the application of section 84 (1) in case of claims made under section 46 (1) and, if a Court of Law tries to give such relief, it will be legislating and not interpreting the law.

I hold that the claim of the plaintiff company is barred by prescription.

I see no reason to differ from the finding of the District Judge that the plaintiff company has not proved to the satisfaction of the Commissioner of Income Tax in terms of section 46 that the Company paid or was liable to pay Indian Income Tax or Super Tax for the assessment years in question.

The acting Attorney-General submitted P38 and the connected documents to a close analysis and argued that in any event the plaintiff company would not be entitled to claim more than Rs. 774·50 in view of the statements made in those documents. This position was contested by the Counsel for the plaintiff company. I do not think it necessary to discuss this question in view of my opinion that the plaintiff's claim is barred by prescription.

I would dismiss the appeal with costs.

CANEKERATNE J.—I agree.

Appeal dismissed.